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In The

Supreme Court of the United States

October Term, 1984

THEODORE CLEAVINGER, MARVIN MARCADIS, and TOM P. LOCKETT,

Petitioners,

v.

DAVID SAXNER and ALFRED CAIN, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

G. FLINT TAYLOR*
CHARLES W. HOFFMAN
343 South Dearborn
Suite 1607
Chicago, IL 60604
(312) 663-5046

Attorneys for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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STATEMENT OF FACTS*

Plaintiffs David Saxner and Alfred Cain were prisoners at the Federal Penitentiary in Terre Haute, Indiana in January of 1975. Saxner was serving a 4 year sentence for a marijuana related offense, while Cain was serving a 5 year sentence. [Tr. pp.4, 98] Both were within 18 months of their maximum release dates, both were due to appear before the Parole Board within the next few months, and both had excellent prison conduct records. [Pl 10, 15]

On January 6, 1975, a black prisoner, William Lowe, died in the Terre Haute Prison hospital under highly suspicious circumstances. He was the first of four black prisoners to die in the hospital in the next seven month period. [Tr. p.5] Lowe's death triggered extreme concern among Terre Haute prisoners, and many participated in a peaceful two day work stoppage on January 7th and 8th to protest his death. [Tr. p.7, Pl. 1] Neither Plaintiff participated in this work stoppage. [Tr. pp.7-8, 118] Rather Saxner, a white prisoner and respected "jailhouse lawyer," and Cain, a black prisoner and the librarian for the African and New World Cultural Society, concentrated their efforts on gathering information concerning Lowe's death and the conditions at the prison hospital, and on informing interested members of the press, Congress,

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*The facts of this case, as summarized in the opinion of the Seventh Circuit and by the Defendants in their Petition, fall far short of capturing the reality of the disciplinary hearings afforded to the Plaintiffs pursuant to the Federal Bureau of Prisons Policy Statement on discipline in effect in 1975. Plaintiffs have therefore submitted this detailed Statement of Facts in order that this Court may be fully informed of the proof at trial.

prison officials, and Saxner's attorney, ACLU lawyer Arpiar Saunders, of the results of the investigation. [Tr. pp.9-10, 118-119] This investigation included the interview of several prisoners who had recently been confined in the prison hospital. [Tr. pp.14-16, Pl. 3] As a result of Plaintiffs' work, a judge, a senator, and several congressmen were contacted, and they wrote letters to the Warden. A national letter writing campaign was launched, accounts were written in several publications, the Assistant Surgeon General came to Terre Haute to investigate, the prison doctor resigned, and ultimately a lawsuit arising from the last of the four hospital deaths was filed. [Tr. pp.9-12, 92-3, 166-7, 179-80, 183] *See Green v. Carlson,* 581 F.2d 669 (7th Cir. 1978), aff'd *Carlson v. Green,* 446 U.S. 14 (1980). During the six weeks following Lowe's death, a "considerable amount of momentum" had been built with Congress, lawyers, and others by the Plaintiffs' investigation. [Tr. pp.18-19]

On February 14, 1975, Plaintiff Saxner was scheduled to appear on local television as part of a cultural program. [Pl. 21] Instead he was called to the Captain's office and told that he was to be transferred to the Prison Farm—a separate enclave where he would be unable to continue his investigation. When Saxner protested the transfer, he was charged with encouraging others to refuse to work. [Tr. pp.20-23] He was taken to an isolated and unused part of the hospital which was temporarily being used as a segregation unit and locked in a cell. [Tr. p.23] An hour later Cain was placed in an adjoining cell, for an identical charge. [Tr. p.24]

Both Plaintiffs remained locked in segregation at the hospital 24 hours a day for the next seven days. [Tr. p.

23] On February 21st, they were brought before the Institutional Disciplinary Committee (IDC) for a "hearing" on the charge. The Committee was made up of three long-time Bureau of Prisons employees who had worked their way up through the ranks from prison guard. Defendant Cleavenger, the Assistant Warden of Programs, was the Chairman of the Committee. He was in charge of the correctional force, education, and classification and parole within the prison, and had been a correctional officer for twenty-one years. [Tr. pp.346-371] Defendants Lockett and Marcadis, two other long-time correctional employees, were the other members of the IDC. Lockett was in charge of classification and parole, while Marcadis was an "operational lieutenant" and acting Captain.* [Tr. p.231]

The Warden sought as IDC members those officers who had "dealt with inmates on a more daily basis." [Tr. pp.229-230, 272-3] There was no training, instruction or education given to these IDC members, other than that they were to follow the policy statement on discipline.

The Bureau of Prisons Policy Statement on Discipline which was operative on and before February 14, 1975, [Pl. 7] did not provide for the presence or cross examination of adverse witnesses, representation by a lawyer, a taped or otherwise verbatim record of the proceedings, a standard of proof, clearly defined standard of punishment, or for non-agency or judicial review. Although the policy statement permitted a prisoner to call

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*According to Warden Benson, either Cleavenger or Captain DuBois briefed him prior to Plaintiffs' hearing on the "investigation" and informed him that the Plaintiffs were "suspects," and "under investigation." [Tr. p.233]

witnesses unless security or repetition prevented it, that was not the practice at Terre Haute. By the Defendants' own admission, live testimony was "not the common way" and guards never appeared before the Committee to present evidence. [Tr. pp.387, 401]

Saxner was brought before the Committee on the charge of "Encouraging Others to Refuse to Work." The "investigation" of the incident stated that Saxner:

> . . . stated that this charge was totally absurd and that he was categorically innocent. He stated that he was charged with this because he refused to go to the Farm Camp. He said he had nothing else to say. His attitude was fair during the interview,

and listed as "other facts" only that "considering the various items picked up from this man's cell, I would say there is little doubt about his activities." [Pl. 5, p.2]

These items, obtained in a search of Saxner's cell, were attached to the report. They consisted of a four page "press release" entitled "Prisoners at Terre Haute Seek an Investigation" which Saxner had sent to fifty newspapers [Pl. 1, Pr. pp.11-12]; a four page document which detailed interviews with prisoners on the subject of their medical treatment at the hospital [Pl. 3]; and a letter from Saxner to ACLU lawyer Arpiar Saunders which enclosed the other two documents and which discussed medical conditions, possible lawsuits on behalf of the Lowe family and segregated prisoners, communications with the press, and the obtaining of local lawyers. [Pl. 4] The remainder of the investigator's report consisted of his

conclusion "guilty as charged. A definite ringleader in the activity charged." [Pl. 1]

Neither the investigating nor charging officer was brought before the committee, nor was any more detail provided from them in writing. The "information" allegedly "received" by the charging officer—that Saxner was encouraging the work stoppage—was not detailed or verified in any way. Saxner professed his innocence, offered to take a lie detector test at his own expense, requested that he be permitted to call inmates to confirm that he was not encouraging a work stoppage, and to confront his accusers. [Tr. pp.34-35] All of these requests were denied.* The committee presented the aforementioned documents as its "evidence" against Saxner, and when it said that was all the evidence it had, both Saxner and his correctional employee representative told the Committee that the charge was "preposterous," and that it had presented no evidence of encouraging a work stoppage. The staff representative said that the committee would have to "reword the charges or present more evidence because . . . . the evidence didn't correspond to the charge." [Tr. pp.31-32]

The committee then caucused and, *sua sponte*, orally charged the Plaintiff with two new "offenses": "unauthorized use of the mails" for mailing the press release

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*The requests for witnesses were denied because they were allegedly repetitive of affidavits presented by Saxner. [Tr. pp. 357-358] The Committee's attitude about the credibility of prisoner testimony is demonstrated by its statement that it would be "very foolish" to take other prisoners' evidence because they "would not admit Saxner did it anyway." (Def. 10, p.2)

through the "Prisoners Mail Box" (PMB)* and possession of "contraband" for possessing the seized documents. [Tr. p.32] Saxner was given no written notice whatsoever of the new charges, and no time to prepare a defense. [Tr. p.35] Even the Warden admitted that these actions directly violated existing BOP policy with regard to notice and committee composition.**

The non-verbatim "record" of the hearing which was never tendered to the Plaintiff, shows that the Committee interrogated Saxner at length with a primary focus on the contents of the seized documents and on the Plaintiffs' investigation, the contents and veracity of which the committee members repeatedly and defensively challenged. [See Def. 10, esp. pp.3-5]

Saxner protested to the Defendant Committee members that their actions violated BOP policy and the Constitution [Tr. p.33], but they nonetheless found him guilty of all three charges. [Tr. p.36] Their written "findings" did little more than reiterate the proffered charges,*** and

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*The Policy Statement on the Prisoners Mail Box which was operative at that time expressly provided for its use for mail to the media. [Pl. 2, p.11]

**The Policy Statement provided that the prisoner be given notice of the offense in writing within 24 hours of its commission, and at least 24 hours before the hearing [Pl. 7, pp. 9,10]; and further that committee members could not have also investigated, witnessed or reported the incident. [Ibid., p.10]

***Under "Reason for Action Taken" the Committee wrote: "Saxner was found Guilty of Encouraging Others to Refuse to Work from the information received from staff and the written and investigative reports. He was also found Guilty of Unauthorized Use of Mail (701) (sending manuscripts out) and Possession of Contraband (article from Prisoners Union, Leavenworth Penitentiary). It is felt the Education Supervisor, or his representative, should talk with Saxner regarding manuscripts and the regulations." (Def. 10)

the testimony of the IDC Defendants at trial revealed that their reasons for finding Saxner guilty were confused, contradictory and did not support a guilty finding of any of the charges. This testimony further showed that the Defendants improperly considered the contents and dissemination of the documents and Plaintiffs' investigation to be evidence in support of the work stoppage charge, and lent substantial support to the conclusion that it was for these constitutionally protected activities that both Saxner and Cain were in reality charged and convicted.*

Plaintiff Cain was then brought before the same IDC on an identical "encouraging" charge. He too denied the charge, offered to take a lie detector test, and requested the right to confront his accusers. These requests were denied [Tr. p.102] During the hearing a second charge—possession of contraband—was brought without prior no-

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*Defendant Cleavenger said that the documents [Pl. 1,3] "advocated an investigation" of Lowe's death, that they "talk(ed) against the institution and want(ed) to say that we are doing wrong things which is wrong" [Tr. p.356], thereby making them "contraband" and their possession a violation of the "encouraging" provision as well. [Tr. pp.356-7, 373-4] He redefined the press release to be a "manuscript" because it named staff and inmates for publication and therefore claimed that sending it through the PMB, where it would not be censored, was "unauthorized use of the mails." [Tr. pp.376-80] No policy statement or other such document defined a manuscript in this way, forbade the naming of staff or other prisoners in either a communication to the press or a manuscript, or made the mailing of a manuscript, either by PMB or regular mail, a disciplinary offense [see and compare Pl. 2, para. 3; Def. 2, particularly para. 41, 5(a) (1), (2) and (15); Pl. 22, para. A, and para.5, p.2]. Marcadis said that the documents supported the work stoppage charge because they were "inflammatory" and referred to the Lowe death as "murder." [Tr. pp. 396-397] Similarly, Benson testified that Saxner had no reason or right to investigate as he was not a "medical doctor." [Tr. p.268]

tice. [Tr. pp.106-107] The "contraband" was a 1973 letter to the Bureau of Prisons from "Inmates of Terre Haute Prison" which set forth the case for a prison labor union at Terre Haute. [Pl. 14] This document, seized from Cain's cell, was also available from the Cultural Society library. [Tr. pp.114-116] According to the hearing "record," Cain was interrogated as to whether he supported, was "talking up," or forming a labor union. Cain denied that he was, but professed that a union would be beneficial. Defendant Lockett then told him to shut up. [Tr. p.104, p.2] Cain was shown Saxner's letter to attorney Saunders, and Marcadis asked him if he had anything "in his possession that was encouraging dissension or unrest, or an attitude to encourage people to get up in arms in violation of the rules." [Tr. pp.102-103, Pl. 13, pp.2-3] Cain denied this as well, stated that he had spoken against the January work stoppage, and cited the proximity of his parole hearing and jeopardizing his college classes as further reasons why he would not have committed the offenses. [Pl. 13, pp.1,3] The "record" of the hearing further stated that "Cain identified Saxner as the writer of the letter to Arpiar Saunders." [Pl. 4, p.3]

Cain, like Saxner, was found guilty of all charges. Both men were sentenced to an indefinite stay in segregation and had approximately three months of good time "forfeited."

Cain was held in L Unit until March 21, 1975, making his entire period of segregation on these charges 35 days. He was confined in his cell for more than 23½ hours a day, had no access to the prison yard or exercise facilities, and was permitted to go outside for only one-half to one hour per week, rather than the six hours per day which

was permitted in general population. He could shower and shave only twice a week, could not attend his college classes, or use the law library or educational facilities, and had to eat in his cell rather than in the cafeteria. [Tr. 52, 108-9, 235-6] His cell window was broken, and he was deprived of much of his personal property; many books, papers and his radio were never returned to him. (See Pl. #23) He could not go to his job in the paint shop, and therefore could not earn good time which would shorten his maximum outdate. [Tr. 110-11] He could not participate as librarian of the New World Cultural Society. [Tr. 111-12]

While in segregation he was "highly frustrated" and "nervous," because he "was locked up for something he didn't do" for an indeterminate period of time, and because he could not make parole unless the case were overturned. [Tr. 123] In fact, Cain did not make parole in June, and instead was released on his maximum outdate in December, a date which he was unable to shorten by earning good time while he was segregated.

Saxner was sent to G Unit and spent the first week in the Unit's first cell. The cell had no window or functioning light bulb, and he spent the first five days in near total darkness until his complaints were heard and a new light bulb supplied. [Tr. 41-2] The conditions in the cell were "repulsive." Vomit and feces were caked on the walls, floor and toilet seat. He was not permitted to leave his cell, where it was extremely hot due in part to poor ventilation. [Tr. 41-2, 46, 78] He had no pillows, blankets or sheets and no cleaning materials for several days, although he repeatedly requested them. The unit was "infamous" for beatings, and he witnessed a beating during

his stay there. [Tr. 37-40, 55] Conditions in G Unit were even more restrictive than in L, as it was used to house especially dangerous prisoners. [Tr. 37-40, 77] Saxner brought these repulsive conditions to the specific attention of Defendant Cleavenger by a letter dated February 24th [Pl. 8, T. 43-44], and in person to Defendant Marcadis who visited G Unit a "number of times" during the week Saxner was held there. [Tr. 45] After seven days, he was transferred to L Unit for an additional two weeks, where he was subjected to similar conditions as Plaintiff Cain. He too spent a total of thirty five days in segregation.

Saxner likewise suffered fear and anxiety while in segregation. He feared physical harm, particularly while in G Unit. [Tr. 55] He lost weight, and harbored a constant fear that he would not make parole because it was Bureau of Prisons' policy to deny parole if a prisoner had lost good time in the six months prior to the Board appearance. [Tr. 54, 55] He had a deservedly high expectation of making parole before the loss of good time, and dreaded the loss of fifteen months of freedom during his entire stay in segregation. [Tr. 53, 58, Pl. 10]

It was Bureau of Prisons policy for the IDC committee to "review" segregation cases after ten days. [Tr. 366] The Defendants, if they followed Bureau of Prisons policy, held this review and continued Plaintiffs in segregation. The Plaintiffs appealed to Warden Benson, and, on March 21st their appeal was partially granted at his recommendation. They were returned to general population and their good time was restored, but their request for expungement was denied. (Pl. 10) They appealed to the Regional Office of the Bureau of Prisons, and after the Regional Office so recommended, the Plaintiffs were

granted expungement on April 11th. [Tr. 63] Warden Benson claimed that the action was taken because of pressure from Saxner's family, and because of due process violations [Tr. 273, 275] rather than due to their innocence; the Bureau Policy Statement on Discipline, however, mandates expungement only where the "inmate has been determined innocent of the charges." [Pl. 7, para. 9(d) (1), at p.12]

Saxner appeared before the Parole Board on April 11, 1975, was granted parole, and was released on April 25th. Cain went to the Board in June, but was continued to his maximum date in December, when he was finally released. Both have remained on the street since that time, both have families, and both have been gainfully employed since their release. [Tr. 3-4, 97]

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REASONS FOR DENYING THE WRIT

The Defendants assert that certiorari should be granted because the opinion below, holding that federal prison Institutional Disciplinary Committee (IDC) members are entitled to qualified immunity only ignores the "functional analysis" of *Butz v. Economou*, 438 U.S. 478 (1978), and is in conflict with the Fourth Circuit's opinion in *Ward v. Johnson*, 690 F.2d 1098 (4th Cir. 1982). These assertions are without merit. The opinion below is in complete accord with *Butz* and is clearly distinguishable from *Ward*. There are, therefore, no compelling reasons which require that certiorari be granted.

A. The Seventh Circuit Properly Applied The Factors Set Forth In Butz v. Economou In Concluding That The Defendant IDC Members Are Entitled To Only Qualified Immunity.

Numerous decisions of this Court over the years have clearly established the general rule that executive officials are entitled to only qualified immunity from damages liability for constitutional deprivations. *See Wood v. Strickland,* 420 U.S. 308 (1975); *Pierson v. Ray,* 386 U.S. 547 (1967); *Scheuer v. Rhodes,* 416 U.S. 232 (1974); *Procunier v. Navarette,* 434 U.S. 563 (1978). This general rule, however, is "subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Butz,* 438 U.S. at 507.

One of those "exceptional situations" applies to executive officials, such as prosecutors, who are so closely connected to the judicial process that they are entitled to a "quasi-judicial" absolute immunity. *See Imbler v. Pachtman,* 424 U.S. 409 (1976). Based on the concept of "quasi-judicial" immunity, this Court in *Butz* carved out an additional narrow exception to the general rule of qualified immunity for executive officials. The *Butz* Court recognized that certain executive officials—specifically, hearing officers subject to the Administrative Procedure Act (APA)—were "functionally comparable" to judges and were entitled to "quasi-judicial" immunity for acts committed in their adjudicatory capacity. The Court reached this conclusion, however, only after finding 1) that the adjudicatory process involved contained sufficient safeguards to reduce the need for private damage actions as a means of controlling unconstitutional conduct; 2) that the responsibilities of the hearing officers were functionally

comparable to those of a judge and the specific acts complained of were adjudicatory in nature; and 3) that the performance of the official's adjudicatory duties made him or her a likely target for harassing or intimidating litigation. *See Butz,* 438 U.S. at 512-513.

The Defendant hearing officers in *Butz* met each of these requirements. The Defendant IDC members in the instant case meet none.

1) The lack of procedural safeguards contained in the Federal Bureau of Prison's Policy Statement which governed institutional disciplinary proceedings at the time of Plaintiffs' hearings requires that I.D.C. members be entitled to only qualified immunity.

Under *Butz,* absolute immunity attaches only to those executive officials who are engaged in an adjudicatory process which contains "many of the same safeguards as are available in the judicial process," such as the impartiality of the decision-making process; the reliability of the information developed; the importance of precedence in resolving controversies; the adversary nature of the proceedings; and the availability of review. *Butz,* 438 U.S. at 512-513.

The *Butz* Court found that the Administrative Procedure Act contained sufficient safeguards since its protections included notice, representation by a lawyer, a verbatim transcript of the proceedings, subpoena power, presentation of oral and documentary evidence, cross-examination of adverse witnesses under oath (limited only by considerations of relevancy and materiality), rebuttal evidence, and prehearing discovery. 5 U.S.C. §§554-557. The

Act also provides for imposition of a burden of proof, and findings and conclusions presented by the parties and ruled on by the hearing officer. Also, the hearing officer may not be involved in prosecutorial or investigative duties or be supervised by an employer interested in the case, and is subject to recusal for personal bias. 5 U.S.C. §§554-557, 701-702.

Comparison of the disciplinary policy of the Federal Bureau of Prisons in effect at the time of this incident with the APA clearly establishes that the prison disciplinary adjudicatory process falls woefully short of the requirements of *Butz*. It provided precious few of the procedural safeguards contained in the APA. Prisoners, typically uneducated and unschooled in law or procedure, were afforded neither a lawyer nor an independent non-staff representative. There was no right to compel witnesses or to cross-examine adverse witnesses under oath; no right to discovery, rebuttal, findings of fact or conclusions of law. Nor was there a cognizable standard of proof. No verbatim transcript of the hearings was made. As Judge Cudahy recognized in his concurring opinion below:

> The disciplinary policy of the Bureau of Prisons provides few of the safeguards of the APA. The committee members are prison guards and supervisory employees who are in daily contact with the prisoners upon whom they sit in judgment. The committee members are supervisors and fellow employees of the guards who bring the charges and are in an unequal adversarial relationship with the prisoners. They are the keepers judging the kept rather than impartial adjudicators trained in law and presumably free of bias and prejudice. In addition, the information presented to the committee is frequently hearsay, self-serving and unreliable. *See Bracy v. Herringa*, 466 F.2d 702 (7th Cir. 1972). Of course, the decisions of the committee are not based on precedent since there is no recorded precedent. And review is restricted to agencies of the Bureau of Prisons. To suggest that the committee functions in any real respect like the administrative law judge in *Butz* is to depart from reality.

Saxner v. Benson, 727 F.2d 669, 675 (7th Cir. 1984) (Cudahy, J., concurring).

2) The particular facts and circumstances of Plaintiffs' hearings and the multiple roles played by the I.D.C. members at those hearings—that of accuser, interrogator, prosecutor, judge and jailer —go far beyond a limited "quasi-judicial" capacity and further entitle the Defendants to only qualified immunity.

Butz also requires that the executive official who seeks absolute immunity be limited to performing "quasi-judicial" adjudicatory acts. The Defendants rely on certain selected aspects of their involvement in the incident here in an attempt to bolster their claim for absolute immunity. In fact, the record as a whole in this case graphically underscores why these Defendants should not receive absolute immunity. The hearings involved here were in no way "quasi-judicial" adversarial proceedings, with a reliable fact finding process, impartial fact finders or minimal procedural safeguards. Rather, the hearings were part of an inquisitional process, wherein the IDC Defendants acted as the charging guards, the interrogators, the prosecutors, the judges and the jailors.

There was evidence that at least one of the Defendants, Cleavenger, participated in the investigation of the

Plaintiffs, a function not entitled to absolute immunity. *Hampton v. Hanrahan,* 484 F.2d 601 (7th Cir. 1973). The inquisitional nature of the proceedings was further reflected by the detailed interrogation of the Plaintiffs by the Defendants—a function performed historically by law enforcement officers who are entitled to qualified immunity only. *Pierson v. Ray,* 386 U.S. 547 (1967). One of the Defendants was an operations Lieutenant, specifically in charge of the Plaintiffs' custody in segregation following the hearings. Two of the Defendants were responsible for the Plaintiffs' parole and security classifications.

Perhaps most importantly, the Defendants here, after being confronted with the abject weakness of the original charges against Plaintiffs, took it upon themselves to bring additional charges against the Plaintiffs, without prior notice, and proceeded to try and convict the Plaintiffs on those new charges. Thus, one of the major due process violations found by the jury here—the bringing of additional charges without notice—is clearly not an adjudicatory function. Rather it is a law enforcement function. In the prison context, it is the function of a guard. Not even judges are afforded absolute immunity for the act of charging, trying and convicting a defendant. *See Zarcone v. Perry,* 572 F.2d 52 (2nd Cir. 1978). Moreover, the normally unequal and adversarial quality of the inmate-keeper relationship was further exacerbated here by the Plaintiffs' outspoken public criticism of the Defendants and their institution, whom they were investigating on serious charges. The evidence at trial strongly suggested that Plaintiffs were charged and segregated by these Defendants in retaliation for pursuing these constitutionally protected rights. *See, e.g. Johnson v. Avery,* 393 U.S. 483 (1969);

Bounds v. Smith, 430 U.S. 817 (1977). As Judge Cudahy stated below:

> The activities and procedures of these prison officers are so dissimilar in form and substance from those of judges granted absolute immunity that reliance on an all-encompassing similarity of quasi-judicial function will not wash. As Chief Judge Winter has pointed out, performance of "quasi-judicial" functions does not automatically trigger absolute immunity. *Ward v. Johnson,* 690 F.2d 1098, 1115 (4th Cir. 1982) (Winter, C.J., dissenting). Thus, in *Wood v. Strickland,* 420 U.S. 308, 320-321, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975), school board members, who were sued for due process violations in disciplinary proceedings, were afforded only qualified immunity. *See Ward v. Johnson,* 690 F.2d at 1115-16 (Winter, C.J., dissenting). The prison disciplinary proceedings at issue here are certainly much more akin to the school board meeting in *Wood* than to a hearing conducted by an ALJ under the Administrative Procedure Act.

Saxner v. Benson, 727 F.2d 669, 674 (7th Cir. 1984) (Cudahy, J., concurring).

It is clear that the unconstitutional actions of *these* Defendants in *this* case should not be cloaked with absolute immunity.

3) The Defendants have made no showing that performance of their duties as IDC members will make them a likely target for harassing or intimidating litigation.

The Defendants assert that IDC members "face a severe threat of harassing or intimidating litigation" because "prisoners as a group are prodigious and indiscriminate litigators." They then predict dire consequences to

both the prison disciplinary system and the federal courts, as a flood of litigation will result unless IDC members are afforded absolute immunity. The Defendants support this argument by citing a statistic which informs that 35% of the Seventh Circuit's civil docket are "prisoner suits" (Defendants' Petition at 10, 18-19).

In reality, the Defendants' statistic is highly misleading. When "prisoner suits" are separated into civil rights and habeas corpus categories, it is revealed that only 2% of the civil cases pending against federal officials on June 30, 1983 in the District Courts of the Seventh Circuit were prisoner civil rights cases—a Circuit which includes four major federal prisons. Similarly, as of June 30, 1983 less than 7% of the civil appeals pending in the Seventh Circuit were prisoner civil rights cases against federal officials.* Moreover, these percentages must be further reduced in order to properly analyze the Defendants' contention, because the civil rights category includes injunctive as well as damages cases.

Finally and most importantly, prisoner damages lawsuits against prison officials who are acting as disciplinary board members comprise a very small percentage of prison damages suits filed against prison officials. The Seventh Circuit has expressly sanctioned damages suits against IDC members for at least 10 years. [See *Chapman v. Kleindeinst*, 507 F.2d 1246 (7th Cir. 1974).] Yet, in that time, it has reviewed less than 15 prisoner damage claims against prison disciplinary board members. And, in the

*These statistics are taken from the Annual Report of the Director of the Administrative Office of the U.S. Courts (1983).

majority of those cases, the claims were substantial and the prisoner prevailed. This is hardly evidence of a barrage of harassing litigation, as the Defendants contend.

4) Public policy is best served by allowing IDC members only a qualified immunity.

An overriding concern expressed by this Court is that grants of absolute immunity are appropriate only when the defendant official establishes that public policy so requires. *Butz v. Economou*, 438 U.S. 478, 506 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982). The Defendants here have made no showing that any public policy requires that they be granted absolute immunity. In fact, the result urged by the Defendants here would, as in *Butz*, result in a policy which is "contrary to the course of decision in this Court from the very early days of the Republic." *Butz*, 438 U.S. at 487.

In *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803), this Court recognized that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 395 (1971), the Court observed that, "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."

To grant IDC members absolute immunity would be to deprive prisoners of their basic right to a damage remedy for violation of their constitutional rights. Such a result is ill considered and unnecessary. Prisoners, perhaps more than any other powerless group in our society, have historically looked to the courts for protection from, and

redress for, abuses inflicted upon them by their keepers. To deny prisoners access to the courts, and to a remedy for the deprivation of their constitutional rights, would leave them at the mercy of officials, whose goals of a tightly run, trouble free institution ofttimes result in policies which conflict with the fundamental rights of the prisoners.*

It is clear that the proper balance to be struck between the rights of prisoners to a damage remedy and the legitimate concerns of prison IDC members, is to afford the latter only a qualified immunity from damages liability. Officials who possess such a qualified immunity have an increasing arsenal available to them to promptly dispose of any insubstantial "harassment" lawsuits with a minimum of cost and inconvenience.

For example, in *Butz*, this Court recognized that, "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading" and stated:

> Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in Scheuer that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 US, at 250, 40 L.Ed.2d 90, 94 S.Ct. 1683, 71 Ohio Ops. 2d 474. In responding to such a motion, plaintiffs may not play dog in the manger; and firm

*In fact, allowing a legal damage remedy for violations of constitutional rights furthers these penological goals by providing prisoners a non-violent method of redress through which to channel their sense of having been wronged by prison officials.

> application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

Butz, 438 U.S. at 507-508. Moreover, under this Court's recent modification of the qualified immunity standard, the defendant is entitled to immunity if it can be shown that the right complained of was not clearly established, thus allowing for prompt disposition without the necessity of pretrial discovery proceedings. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Finally, in most circuits if the defendant's qualified immunity claim is denied by the trial court, he or she is entitled to a pretrial appeal of that ruling. *See McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982); *Evans v. Dillahunty*, 711 F.2d 828 (8th Cir. 1983); *Krohn v. United States*, 742 F.2d 24 (1st Cir. 1984). *Contra, Forsyth v. Kleindeinst*, 729 F.2d 267 (3rd Cir. 1984), *cert. granted*, No. 84-335, October 29, 1984 (53 U.S.L.W. 3311).

These legal weapons available to defendants who possess qualified immunity are more than sufficient to protect them from any perceived threat of harassment. In the context of prison disciplinary cases, all these IDC officials have to do is follow the clear and simple constitutional requirements of *Wolff v. McDonnell*, 418 U.S. 539 (1974), and they have no reason to fear harassment or liability.

Additionally, federal prison officials enjoy further protections—they are defended, free of charge, by Government attorneys who, as this case so aptly demonstrates, are unfettered in their litigational pursuits by any financial restraints. Conversely, lawyers who would bring such cases on behalf of prisoners are deterred by their inabil-

ity to obtain an award of attorneys fees from the defendants if they prevail on the merits. *See Saxner v. Benson*, 727 F.2d 669, 673 (7th Cir. 1984); *Lauritzen v. Lehman*, 736 F.2d 550 (9th Cir. 1984). As a result, market forces will usually dictate that plaintiffs' lawyers will pursue only the most substantial claims, further reducing the likelihood of "harassing" litigation.*

B. No Conflict Exists Between The Opinion Of The Seventh Circuit In Saxner v. Benson And The Opinion Of The Fourth Circuit In Ward v. Johnson.

The Defendants also assert that certiorari should be allowed because the Courts of Appeals are divided on the issue of whether prison disciplinary committee members are entitled to absolute or qualified immunity. The Defendants compare the opinion below in *Saxner* and *Jihaad v. O'Brien*, 645 F.2d 556, 561 (6th Cir. 1981) (Qualified Immunity), with *Ward v. Johnson*, 690 F.2d 1098 (4th Cir. 1982) (Absolute Immunity).

In fact, the Defendants' assertion is specious and based upon the most superficial reading of those cases.

*Counsels' involvement in this case constitutes a rare exception to this general rule. Counsel, who have been involved in a substantial amount of prison litigation, committed themselves to provide legal representation to those persons who were endeavoring to bring out the truth behind the series of deaths at the prison hospital at Terre Haute Penitentiary in 1975. *See Carlson v. Green*, 446 U.S. 14 (1980). It was this commitment, rather than economic desirability, which led counsel to represent Plaintiffs Saxner and Cain on a contingent fee basis in their claims against the IDC Defendants. For what will ultimately be a potential maximum fee of $3,000.00, counsel conducted a week-long jury trial hundreds of miles from their offices, represented Plaintiffs on appeal before the Seventh Circuit, and have now prepared this Brief.

A close examination reveals that no conflict exists among the Courts of Appeals on this issue.

Comparing the result in *Saxner* with the result in *Ward* is a classic example of comparing apples and oranges. As *Butz* clearly indicates, before absolute immunity will be accorded to executive officials performing quasi-judicial functions, the adjudicatory process in which they are engaged must be examined to determine the sufficiency of its procedural safeguards. The Court in *Ward* considered the disciplinary procedures in effect in the Virginia state prison system—a system entirely distinct from that in effect in the federal prison system involved in *Saxner*.

In *Ward*, under the Virginia regulations, a prisoner was entitled to be represented by a lawyer and afforded the right to confront and cross-examine his accusers. A tape recorded transcription of the proceedings was made and the prisoner had the right to present either oral testimony or written statements. The disciplinary committee was specifically barred from discovering the prisoner's prior prison record before guilt or innocence was determined. The Fourth Circuit relied heavily on these procedural guarantees, many of which were not required by *Wolff*, in determining that the hearing in *Ward* was "adversarial" within the meaning of *Butz*. Of course, federal prison disciplinary policy at issue in *Saxner* provided for *none* of these safeguards.

Secondly, as *Butz* makes clear, absolute immunity extends only to those acts of the defendant which are judicial in nature. In *Ward*, the act of the defendants complained of—a decision not to allow the testimony of certain witnesses as cumulative—was considered an exercise

of judicial discretion in making an evidentiary ruling. In sharp contrast to *Ward*, the major violation complained of in *Saxner* was the bringing of new charges by the IDC members themselves, without prior notice, during the hearing itself—an act that cannot be described as judicial in nature.

The holding in *Ward* reveals that no conflict exists between that decision and the decision in *Saxner*. On the contrary, the language of the Court in *Ward* makes clear that had it sat on the *Saxner* case, it would have reached the same result as that reached by the Seventh Circuit:

> We are not concluding that in connection with all prison disciplinary hearings the members of the Adjustment Committee enjoy absolute immunity. Perhaps this case would be different if the plaintiff had been denied absolutely any notice of the charge against him, or if he had been denied the right to confront and cross-examine his accusers at the disciplinary hearing (through this right is circumscribed in *Wolff*), but that is not the claim of error here.
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> • • •
>
> Our ruling illustrates the principle that every case in which immunity is claimed for members of the Adjustment Committee should be considered on its own facts, and with reference to the particular procedure under which the disciplinary hearing is held. To qualify for absolute immunity, the action involved must be of a judicial character and the procedure followed in connection with the hearing must include the 'safeguards' of a fair and impartial proceeding as stated in *Butz*. Thus, absolute immunity will not attach to action taken by the members of a committee whose functions may be properly classified as administrative or investigative rather than adjudicatory. Moreover, the procedure followed in the

> hearing must insure for the accused inmate, as far as reasonably practical, similar rights to those the typical defendant would be entitled to before a tribunal realistically insulated from prejudicial influences or bias and from whose rulings and decisions the inmate would have an effective means of appeal. Where such rights are not so "safeguarded," the criteria are for absolute immunity as established in *Butz* are not met.

Ward, 690 F.2d at 1108-1109.

With regard to the immunity to be afforded to federal IDC members under the policy in effect in 1975, the Courts of Appeals are not in conflict. In the only decision other than *Saxner* on the issue, the Sixth Circuit has held that an IDC hearing afforded by federal officials under the policy in effect in 1975 was an "informal disciplinary hearing" which was not "one of those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business." *Jihaad v. O'Brien*, 645 F.2d 556, 561 (6th Cir. 1981)

As no conflict exists among the Circuit Courts of Appeals, no reason exists to grant certiorari here.

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CONCLUSION

The opinion of the Seventh Circuit in *Saxner v. Benson* is in complete accord with this Court's decision in *Butz v. Economou*. The Defendants have demonstrated no "exceptional situation" which requires that they be accorded absolute immunity from damage liability for violation of clearly established constitutional rights. Moreover, no conflict exists between the Courts of Appeals on

the issue of the immunity to be afforded to federal IDC members.

For these reasons, the Defendants' Petition for a writ of certiorari should be denied.

Respectfully submitted,

G. Flint Taylor*
Charles W. Hoffman
343 South Dearborn
Suite 1607
Chicago, IL 60604
(312) 663-5046

Attorneys for Plaintiffs

*Attorney of record

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